

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SANDRA EARL,

Defendant-Appellee.

UNPUBLISHED

May 22, 2001

No. 229152

Wayne Circuit Court

LC No. 99-005996

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

STANDFORD PROFFETT,

Defendant-Appellee.

No. 229153

Wayne Circuit Court

LC No. 00-001217

Before: McDonald, P.J., and Smolenski and K. F. Kelly, JJ.

MEMORANDUM.

In these consolidated cases, the prosecutor appeals as of right from circuit court orders dismissing the criminal charges against both defendants. We decide these appeals without oral argument pursuant to MCR 7.214(E). We reverse and remand.

The prosecutor contends that the trial court erred when it declined to hold a due diligence hearing regarding the unavailability of the complaining witness for purposes of admitting her preliminary examination testimony under MRE 804(b)(1). We agree.

If a declarant is unavailable as a witness, testimony given at another hearing of the same or a different proceeding is admissible if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. MRE 804(b)(1). A declarant is deemed unavailable if he is absent from the hearing and the proponent of his testimony has been unable to procure the declarant's attendance by process or other reasonable means, and in a criminal case, due diligence is shown. MRE 804(a)(5). The

party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

The trial court ruled that MRE 804 was inapplicable to a complaining witness, who must attend trial and testify personally. This is an incorrect statement of law. MRE 804 refers to statements or former testimony made by a "declarant." A declarant is "a person who makes a statement." MRE 801(b). The term "declarant" is not limited to any particular class of persons and thus the former testimony of a complainant, like that of any other witness, is admissible under MRE 804(b)(1). See *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999); *People v Hayward*, 127 Mich App 50, 55-58; 338 NW2d 549 (1983).¹ The trial court erred as a matter of law when it ruled that a complaining witness' former testimony was not admissible under MRE 804(b)(1).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

¹ Further, we reject defendants' argument that a prosecutor must provide a defendant with written notice, in advance of trial, of the prosecutor's intent to seek admission of a witness' former testimony under MRE 804.